Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 97-11
Implementation of Section 402(b)(2)(A)	)	
of the Telecommunications Act of 1996	)	

JOINT COMMENTS OF BELL ATLANTIC[1] AND NYNEX[2]

I. Summary

As the Commission correctly recognizes, it is time to eliminate the burdensome section 214 permit requirement that, having long outlived its usefulness, now only remains as an impediment to constructing new facilities to benefit consumers. Indeed, under the 1996 Act, the section 214 permit requirement for the construction of facilities must be repealed for two reasons. First, the Act expressly requires the Commission to exempt common carriers from the requirements of section 214 for the extension of any line, which encompasses all new construction by existing carriers. Second, as the Commission itself concludes, the forbearance provision of the new Act requires, at a minimum, that the Commission eliminate the construction

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] The NYNEX Telephone Companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

permit requirement for dominant carriers governed by price cap regulation. Regardless of how it reaches the result, the Commission is correct to eliminate this requirement.

II. The Act Eliminates All Construction Permits Under Section 214

Section 402(b)(2)(A) of the Act exempts carriers from section 214 application requirements for the "extension of any line." The Commission, however, proposes to limit the reach of the exemption to eliminate the construction permit requirement only in geographic territories that a carrier's network "does not currently reach."[3] Such a narrow interpretation cannot be squared with the language of the new Act and the Commission's own previous interpretations of the section 214 requirement.

The Commission recognizes that an alternative interpretation of section 402(b) that would "exempt ***all*** additions to a carrier's network from the requirements of section 214" would be more "consistent with the Commission's historic treatment of 'new' lines and 'extensions' as one uniform group, without subdivision."[4] In fact, Section 214 itself uses "extensions" and "new lines" as different terms to describe the same thing as demonstrated by the fact that the entire section 214 is titled "extension of lines."[5] As the text of section 214 makes clear, they are both forms of "new construction," and both fall within the title's catch-all category of "extensions" of lines when undertaken by an existing carriers. It makes no difference whether these new lines

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[3] Notice of Proposed Rulemaking, ¶ 21 (rel. Jan. 13, 1997) ("Notice").

[4] Notice, ¶ 35 (ii) (emphasis added).

[5] To determine the meaning of a statute, courts "do more than view words or subsections in isolation." They "derive meaning from context," and "[p]art of that context is the title of the section in which the relevant language appears." ***Hanford Downwinders Coalition, Inc. v. Dowdle***, 71 F.3d 1469, 1475 (9th Cir. 1995).

offer a new service within an existing service area or are to reach a new service area. So long as the carrier already provides service, these new lines are an extension of an existing network, and fall within the exemption approved in the Act.

III. The Commission Should Adopt Its Proposal to Forebear From Applying the Section 214 Construction Permit Requirement to Price Cap Regulated Carriers

As the Commission recognizes, the forbearance provisions of the new Act also requires the repeal of the section 214 construction permit requirement for price cap carriers.[6]

More specifically, the Commission is correct in its tentative conclusion that under the first prong of the Section 10(a) forbearance analysis, the imposition of Section 214 authorization requirements on price cap carriers is "not necessary" to ensure that the charges and practices of these carriers "are just, reasonable and not unreasonably discriminatory"[7] and that it is "not necessary to prevent those carriers from engaging in anti-competitive or discriminatory practices."[8] The section 214 application requirement was created in an earlier era, where telecommunications services were thought to be a natural monopoly. As a result, the intent was to avoid duplication of facilities on the theory was that two "concerns are sometimes worse than one," as "where the traffic will not support two."[9] In other words, the section 214 process was not designed to promote competition, and its elimination would have a pro-competitive impact.

6 Notice, ¶ 48.

7 Notice, ¶ 39.

8 Notice, ¶ 45.

9 ***MacKay Radio & Tel. Co. v. FCC***, 97 F.2d 641, 643 (D.C. Cir. 1938)

In fact, the 214 construction requirement has served its original purpose well, and been used successfully by some entrenched incumbents to limit consumers' competitive choices. Most recently, cable television incumbents were successful in limiting competition through manipulation of the section 214 application process for video dialtone service. The process became so notorious that Congress not only eliminated the video dialtone regulatory construct, but it specifically eliminated 214 requirements for common carriers in their provision of video programming services.[10]

Given this history, the Commission correctly concludes that the section 214 requirement was "not designed to prevent" competitive abuses.[11] At the same time, the Commission is also correct that its existing rules already safeguard against such abuses. The price cap system limits prices to just and reasonable levels, while it eliminates any incentive to make uneconomic investments or to artificially increase a carrier's regulated costs. "Indeed, a fundamental feature of price cap regulation is that it provides incentives similar to those faced by unregulated firms -- successful investments are rewarded and shareholders, not ratepayers, bear the risk for

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10 47 U.S.C. § 571(c).

11 Notice, ¶ 45.

unsuccessful investments."[12] As a result, price caps also eliminate any theoretical threat of cross-subsidy.[13] The Commission also recognizes that, to the extent additional regulatory protections are necessary, the existing Part 32, 61 and 64 rules provide adequate safeguards.[14]

For the same reasons, the section 214 construction permit requirement is unnecessary "to protect consumers"[15] -- the second prong of the forbearance analysis. On the contrary, as the Commission recognizes, the elimination of the requirement will benefit consumers by "reduc[ing] the regulatory costs and delay currently imposed on carriers seeking to introduce new services."[16]

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12 ***Applications of The Chesapeake and Potomac Telephone Companies of Maryland and Virginia for Authority Pursuant to Section 214***, W-P-C 6912, 6966, Affidavit of William E. Taylor, Ph.D. at ¶ 11, filed as an attachment to Opposition of Bell Atlantic to Petitions to Deny (filed Aug. 11, 1994).

13 ***See United States v. Western Elec. Co.***, 993 F.2d 1572, 1580 (D.C. Cir.) (price cap regulation "reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for regulated activity does not automatically cause an increase in the legal rate ceiling"), ***cert denied***, 114 S. Ct. 487 (1993).

14 Notice, ¶ 45.

15 Notice, ¶ 46.

16 Notice, ¶ 46

Based on the foregoing, the Commission is well justified in its conclusion that forbearance is in the public interest.[17] Indeed, in weighing the impact of such forbearance on competitive market conditions, as is required under the Act, there can be no question that it is pro-competitive to forebear from enforcing a provision that is specifically intended to limit competition through a regulatory process that slows or prevents the construction of new facilities.[18]

Conclusion

In this proceeding the Commission seeks to "give effect to the de-regulatory letter and spirit of the 1996 Act in general, and Section 402(b)(2)(A) specifically, thereby promoting competition by removing outdated barriers to entry in telecommunications markets."[19] For the foregoing reasons, the Commission should eliminate the section 214 requirement for price cap regulated carriers.

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17 ***See*** Notice, ¶ 48. In particular, the Commission finds that elimination of the section 214 requirement will further Congress' intent to encourage certain specific competitive activities, including BOC provision of in-region interLATA service. Notice, ¶ 25. Current regulations prevent BOCs from providing most in-region long distance services to their long distance affiliates. Such restrictions, however, are the subject of appeal, s***ee Bell Atlantic v. FCC***, D.C. Circuit Case No. 97-1067, Motion for Summary Reversal (filed Feb. 11, 1997), and the separate affiliate requirement has an automatic sunset provision in any event. In the case of construction of facilities for both the interLATA services the BOCs are currently allowed to provide and any additional services they may be allowed to provide in the future, it is important that the section 214 requirements do not create an additional impediment to such construction. In fact, because in-region long distance service is already subject to a public interest analysis, a 214 requirement would be redundant regulation. ***See*** 47 U.S.C. § 271(d)(3)(C).

18 Likewise, Bell Atlantic and NYNEX support the Commission's tentative conclusion to eliminate the unnecessary reporting requirements under Sections 63.03(e) and 63.04(c) of its rules. ***See*** Notice, ¶ 65.

19 Notice, ¶ 9.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1997 a copy of the foregoing "Joint Comments of Bell Atlantic and NYNEX" was served by hand on the parties on the attached list.

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